

Mr. Timothy E. Welch

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May 7, 2004

If you agree with the USAC response to your Letter of Appeal but would still like the data in question to be accepted by USAC and used to calculate your ICLS payments, you may file a petition for waiver with the FCC. Please refer to the filing information described below.

If you disagree with the USAC response to your Letter of Appeal, you may file an appeal with the FCC. Your appeal must be **POSTMARKED** within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via the United States Postal Service, you should direct the appeal to:

Federal Communications Commission
Office of the Secretary
445-12th Street, SW
Room TW-A325
Washington, DC 20554

Documents sent by Federal Express or any other express mail should use the following address:

Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743
(8:00A.M. – 5:30 P.M.ET)

For hand-delivered or messenger-delivered items, please use the following address:

Federal Communications Commission
Office of the Secretary
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002
(8:00A.M. – 7:00 P.M.)

For security purposes, hand-delivered or messenger-delivered documents will not be accepted if they are enclosed in an envelope. Any envelopes must be disposed of before entering the building. Hand deliveries must be held together with rubber bands or fasteners.

Appeals may also be submitted to the FCC electronically, either by the Electronics Comment Filing System (ECFS) or by fax. The FCC recommends filing with the ECFS to ensure timely filing. Instructions for using ECFS can be found on the ECFS page of the FCC web site. Appeals to the FCC filed by fax must be faxed to 202-418-0187. Electronic appeals will be considered filed on a business day if they are received at any

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time before 12:00 A.M. (midnight), Eastern Standard Time. Fax transmissions will be considered filed on a business day if the complete transmission is received at any time before 12:00 A.M.

Please be sure to refer to CC Docket No. 96-45 on all communications with the FCC. The appeal transmission must also provide your company's name and study area code, plus necessary contact information, including name, address, telephone number, fax number, and e-mail address of the person filing the appeal. Unless the appeal is by ECFS, please include a copy of the letter being appealed.

Sincerely,

USAC

Universal Service Administrative Company

Attachment 2-TCLP's December 23, 2003 USAC Review Pleading

**BEFORE THE
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY
PISCATAWAY, NJ 08854**

In the Matter of)
)
Request for Review by Thumb Cellular Limited)
Partnership of Decision of the Universal Service)
Administrator, Universal Service Administrative)
Company (USAC), High Cost Low Income Division,)
Denying A Request for Interstate Common Line)
Support and Long Term Support)

To: High Cost Low Income Committee

REQUEST FOR REVIEW OF THE DENIAL OF USF FUNDING

Thumb Cellular Limited Partnership (TCLP),¹ by its attorney, pursuant to 47 C.F.R. §§ 54.719(a) & 54.720(b), hereby seeks review of the action of USAC's High Cost Low Income Division (USAC) which denied TCLP's request for Interstate Common Line Support (ICLS) and Long Term Support (LTS). In support whereof, the following is respectfully submitted:

A. Questions Presented For Review

1) a. Whether 47 C.F.R. § 54.307(c) or § 36.612 establishes the FCC Form 507 "filing date" for a Competitive Eligible Telecommunications Carrier (CTEC).

b. Whether USAC correctly determined that the "filing date" for FCC Form 507 specified in the FCC's rules means that the filing must be received by USAC on the last business day prior to the date specified in the rules when the "filing date" falls on an FCC designated holiday.

B. Statement of TCLP's Interest In The Matter Presented for Review

2) In several phone conversations between TCLP, undersigned counsel, and USAC's representatives USAC informed TCLP that USAC would not process TCLP's Spring '03 request for

¹ TCLP is affiliated with Pigeon Telephone Company, Pigeon, MI. For purposes of conflict disclosure, Edwin H. Eichler, serves as an officer in Pigeon Telephone Company and in its parent company, TCLP's general partner, and Mr. Eichler is an observing, non-voting member of USAC's High Cost Low Income Committee.

Interstate Common Line Support and Long Term Support on the ground that TCLP's FCC Form 507 was not timely received by USAC. TCLP has an interest in obtaining a reversal of that decision because that finding prevents TCLP from collecting USF funding for the pertinent period. While TCLP is permitted to seek review of this matter with the FCC without first seeking review from USAC, *see* 47 C.F.R. § 54.719(c), USAC discussed with undersigned counsel that the timing issue raised in this matter appears to be one of first impression for USAC, however, TCLP found contradictory precedent which is discussed below. Consequently, should USAC continue to believe that TCLP's FCC Form 507 cannot be processed, TCLP considers that a written decision from USAC would be appropriate for FCC review purposes.

C. Statement of Facts

3) In various conversations between USAC's representatives and TCLP and undersigned counsel on or about December 10, 11, 16, 2003, USAC advised TCLP that TCLP's FCC Form 507 was not being processed, and that TCLP could not receive USF funding for two quarters, an amount which is guesstimated for purpose of discussion as being in the neighborhood of \$350,000,² for the following reasons: 1) § 54.901 and §54.903 provide the authorization for TCLP to file FCC Form 507 to receive USF ICLS funding; 2) 47 C.F.R. § 36.312(a)(3) provides that the data submitted pursuant to § 54.901 *et seq.* is due "no later than March 30th of the existing year;" 3) USAC cannot process an FCC Form 507 received after March 30, 2003; 4) TCLP's FCC Form 507 was delivered to USAC on Monday March 31, 2003;³ 4) TCLP's FCC Form 507 was due by Friday March 28,

² The amount cannot be known with certainty until after USAC performs the required calculations.

³ TCLP's filing date with USAC can be tracked by UPS Tracking Number A363 7967 153
(continued...)

2003, the last business day before March 30, 2003, because March 30, 2003, the filing date specified at § 36.312(a)(3), was a Sunday.

4) TCLP advised USAC's staff that 47 C.F.R. § 54.307 authorizes TCLP to file an FCC Form 507 with USAC to obtain Interstate Common Line Support and that § 54.307 established March 30th as TCLP's filing date. § 54.307(a) provides that "a competitive eligible telecommunications carrier serving loops in the service area of a rate-of-return carrier shall be eligible to receive Interstate Common Line Support [ICLS] for each line it serves in the service area in accordance with the formula in §54.901." § 54.307(b) provides that "in order to receive support pursuant to this subpart, a competitive eligible telecommunications carrier [CETC] must report to the Administrator the number of working loops it serves in a service area pursuant to the schedule set forth in paragraph (c) of this section." § 54.307(c) provides that data submitted under that section is due "no later than March 30th of each year." Moreover, the Instructions to FCC Form 507, at Item IV, provides that "if you are a CTEC, you must file the number of working loops you serve in the service area of a rate-of-return incumbent carrier . . . 47 C.F.R. § 54.307(b) and (c)."

5) § 54.307 is the provision which authorizes TCLP, as a CTEC, to file FCC Form 507 with USAC to receive ICLS support. §§ 54.307(a)(1) & 54.307(b) clearly provide that competitive carriers are able to obtain ICLS funding by filing line count data in accordance with the schedule found at § 54.307(c). While § 54.307(a)(1) provides that a CETC's ICLS funding level is calculated "in accordance with the formula in § 54.901," §§ 54.901, *et seq.*, are provisions in Subpart K which explicitly provide filing instructions for "Rate-of Return Carriers." For CTECs, § 54.901 merely

³(...continued)

at http://www.ups.com/WebTracking/track?loc=en_US.

provides a funding level calculation formula, that provision does not authorize a CTEC like TCLP, which is not a rate-of-return carrier, to seek ICLS funding. Accordingly, §§ 54.901, *et seq.* are not the provisions which authorize TCLP to seek ICLS funding. The appropriate filing date rule at issue is the one found at § 54.307(c) which provides that TCLP's FCC Form had to be filed with USAC "no later than March 30th." Clearly, TCLP's filing of FCC Form 507 with USAC was prompted by the FCC's rules and USAC should clarify which FCC rule prompted TCLP's filing.

6) TCLP informed USAC that 47 C.F.R. § 1.4(j) provides that when a filing date falls on a holiday, the document may be filed on the next business day. USAC responded that USAC is not the FCC and that USAC does not follow, and is not required to follow, the FCC's procedural rules found at § 1.4, except for those rules specifically dealing with USF. TCLP responded that TCLP's filings are authorized by the FCC's rules and that USAC could not interpret the FCC Form 507 filing date rule without reference to, and in conflict with, § 1.4. TCLP further advised USAC that the "no later than March 30th" filing date language merely establishes a filing date without specifying what happens when the filing date falls on a weekend and that the FCC has long interpreted its filing rules as allowing the filing to be made on the next business day when an established filing date falls on a weekend day. USAC and TCLP agreed that nothing in the FCC's filing rules or FCC Form 507 instructions indicates what happens when a filing date falls on a weekend day.

D. Argument and Statement of the Relief Sought

7) The Instructions to FCC Form 507, at Items I, II, IV, VI, VII, X, XI, XII on FCC Form 507, explicitly state that FCC Form 507, or the pertinent data, is "filed" with USAC which serves as the FCC's USF administrator. 47 C.F.R. § 0.401 provides that "when an application or other filing does not involve the payment of a fee, the appropriate filing address or location is established

elsewhere in the rules for the various types of submissions made to the Commission. The public should identify the correct filing location by reference to these rules." Accordingly, submission of FCC Form 507 to USAC is not an intermediate step in the filing process, filing FCC Form 507 with USAC terminates the FCC Form 507 filing process.

8) Item XII on FCC Form 507 states that "the form must be received at the address listed below [USAC's address] by the due date" while Item X on FCC Form 507 states that the FCC Form 507 filing "Must be received by USAC by the due dates." However, like §§ 54.307(c) & 36.612, these statements do no more than establish a date certain filing deadline and the FCC establishes filing deadlines for nearly every filing which must be made regarding FCC regulated matters.⁴ These statements say nothing about what happens when a filing date falls on a weekend. USAC interprets the filing date requirement to mean that when a March 30 filing date falls on a weekend, or presumably another Federal holiday, that the FCC Form 507 must be received by USAC no later than the last business day prior to the March 30 filing date established in the FCC's rules. However, this rule interpretation unfairly prejudices TCLP's right to collect the ICLS funds it applied for.

9) First, there is nothing in the FCC rules or the Filing Instructions to FCC Form 507 which indicates that the March 30 filing date is properly interpreted as meaning that the filing had to be made on the last business day prior to March 30 when March 30 falls on a holiday as defined at 47 C.F.R. § 1.4(e)(1). § 1.4(e)(4) provides that "the term 'filing date' means the date upon which a document must be filed after all computations of time authorized by this section have been made."

⁴ Absent specific filing dates it is possible that regulatees would not file information required by the FCC. The FCC establishes filing dates in order to compel the filing of information and the mere establishment of a filing date says nothing about the type of day, business or holiday, upon which that date happens to fall.

While either § 54.307(c) or § 36.612 established March 30 as the filing date, March 30, 2003 fell on a weekend holiday as defined by § 1.4(e)(1) and, therefore, the "filing date" became March 31, 2003 by operation of § 1.4(e)(4). While USAC stated that it is not the FCC and is not bound by its procedural rules, TCLP makes FCC filings in accordance with the FCC's rules and TCLP's FCC Form 507 was timely filed with USAC under the FCC's rules.

10) Second, USAC cannot pick and choose which FCC filing rules will be applicable to a filing required to be made by the FCC's rules before TCLP can collect USF funding and USAC cannot determine a "filing date" without reference to § 1.4 where the pertinent filing rule merely specifies a "filing date" without stating that § 1.4 would not apply or which otherwise indicated that the filing could utilize § 1.4's generally applicable "holiday" filing date rule. For instance, it might reasonably be argued that one could not utilize the "holiday" filing date rule in conjunction with a filing made pursuant to 47 C.F.R. § 54.802(a) which requires filings for Interstate Access support to be made "on the last business day of March."⁵ The "last business day" of a month cannot fall on a holiday. Thus, when the FCC intends to limit the applicability of the filing date rule found at § 1.4, it clearly specifies the requirement. Instantly, the FCC did not clearly state that FCC Form 507 had to be filed with USAC no later than the last business day prior to March 30 when March 30 falls on a holiday. The FCC's rules provide that FCC Form 507 are to be filed by March 30 without at all limiting the applicability of § 1.4's holiday filing date rule.

11) This is not a novel timing issue for USAC. The FCC has explicitly advised USAC that it must consider § 1.4 in determining the filing dates of documents filed with it. *See Request for*

⁵ TCLP's filing was received by USAC on March 31, 2003. If § 54.802(a) were at all applicable instantly, TCLP's filing was made as of the last business day in March.

Review of the Decision of the Universal Service Administrator by Xavier High School (Cedar Rapids, Iowa), 16 FCC Rcd. 3759 ¶ 3 (Acct. Pol. Div. 2000) (“Section 1.4(j) of the Commission’s rules, however, provides that in cases where the close of the 30-day period falls on a holiday, the document shall be filed on the next business day.”). The FCC has given USAC, on numerous occasions, the instruction that § 1.4 applies to USAC’s filing date calculations in matters relating to USF funding issues. See *Request for Review of the Decision of the Universal Service Administrator by Soille San Diego Hebrew Day School (San Diego, California)*, 15 FCC Rcd. 24656 ¶ 3 (Acct. Pol. Div. 2000) (“Section 1.4(j) of the Commission’s rules, however, provides that in cases where the close of the 30-day period falls on a holiday, the document shall be filed on the next business day.”); see also, *Request for Review of the Decision of the Universal Service Administrator by Western Heights School District I-41 (Western Heights, Oklahoma)*, 15 FCC Rcd. 23818 ¶ 3 (Acct. Pol. Div. 2000); *Request for Review of the Decision of the Universal Service Administrator by Newton County School District (Decatur, Mississippi)*, 15 FCC Rcd. 23572 ¶ 3 (Acct. Pol. Div. 2000); *Request for Review of the Decision of the Universal Service Administrator by Corpus Christi Independent School District (Corpus Christi, Texas)*, 15 FCC Rcd. 23565 ¶ 3 (Acct. Pol. Div. 2000); *Request for Review of the Decision of the Universal Service Administrator by Gulfport School District (Gulfport, Mississippi)*, 15 FCC Rcd. 23532 ¶ 3 (Acct. Pol. Div. 2000); *Request for Review of the Decision of the Universal Service Administrator by Durham Unified School District (Durham, California)*, 15 FCC Rcd. 22201 ¶ 3 (Acct. Pol. Div. 2000); *Request for Review of the Decision of the Universal Service Administrator by Roosevelt Elementary School District 66 (Phoenix, Arizona)*, 15 FCC Rcd. 22183 ¶ 3 (Acct. Pol. Div. 2000); *Request for Review of the Decision of the Universal Service Administrator by Moon Area School District (Moon Township, Pennsylvania)*, 15 FCC Rcd.

22177 ¶ 3 (Acct. Pol. Div. 2000); *Request for Review of the Decision of the Universal Service Administrator by Bloomfield Public Library (Bloomfield, Iowa)*, 15 FCC Rcd. 22165 ¶ 3 (Acct. Pol. Div. 2000); *Request for Review of the Decision of the Universal Service Administrator by New Haven Public Schools (New Haven, Connecticut)*, 15 FCC Rcd. 18807 ¶ 3 (Acct. Pol. Div. 2000). The FCC has clearly, and repeatedly, instructed USAC to use § 1.4 in calculating USF filing dates and has instructed USAC that "where the close of the 30-day period falls on a holiday, the document shall be filed on the next business day." USAC's statement to TCLP that it is not required to follow the FCC's procedural rule found at § 1.4 is incorrect.

12) Even in FCC comparative application cases, proceedings which involve mutually exclusive applications and which present situations in which application filing "cut-off" dates are strictly construed, *see Memorandum Opinion and Order*, 8 FCC Rcd. 3558 ¶ 3 (FCC 1993) ("the Commission strictly enforces its cut-off rules"), the FCC long ago determined that § 1.4's holiday filing date rule applied to the strictly construed "cut-off" rule when the FCC established a date certain filing date to be "no later than Saturday, July 19, 1975." *See e.g., Communication Gaithersburg, Inc.*, 60 FCC 2d 537 ¶ 8 (FCC 1976). *See also, Assignment of Call Sign WPFX961*, 18 FCC Rcd. 1875 n. 12 (CWD 2003) (a petition for reconsideration is timely filed after the 30th day, on the next business day, when the 30th day falls on a weekend day). There nothing in the rules indicating that the FCC Form 507 filing deadlines are to be strictly construed, but even if there were, § 1.4 would still apply absent an explicit statement indicating that § 1.4 would not apply.⁶

⁶ The FCC's decision concerning Part 54 filings in *Implementation of Interim Filing Procedures for Filings of Requests for Review Federal-State Joint Board on Universal Service, Order*, 17 FCC Rcd. 339 n. 8 (FCC 2001) states that "because Commission offices were closed on September 11, 2001, documents that would otherwise have been due on that date were not due until (continued...)"

13) Third, the court of appeals has determined that "fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration." *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985). As discussed above, the FCC has not provided any notice that the March 30 deadline would be interpreted in the manner which USAC is applying instantly such that FCC Form 507 must be submitted to USAC on the last business day prior to March 30 if March 30 falls on a Federal holiday as defined in § 1.4. To the contrary, the FCC has explicitly advised USAC that § 1.4 applies in calculating the "filing dates" of documents filed with USAC. Because there was no prior notice of the interpretation that the ICLS benefit would be forfeited if TCLP did not file FCC Form 507 with USAC on the last business day prior to March 30, 2003, it is a violation of TCLP's right to Due Process, where USAC is acting for the FCC under color of governmental authority, to deny the ICLS federal benefit.

WHEREFORE, given the text of the FCC's various filing date rules, including § 1.4 and the § 1.4 instructions the FCC has provided to USAC, given the lack of notice of the rule interpretation being utilized by USAC, an interpretation which clearly conflicts with the FCC rules and with the prior determinations that USAC is to use § 1.4 in determining filing dates, TCLP reasonably filed its

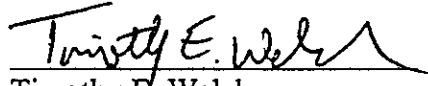
⁶(...continued)

September 12, 2001, pursuant to 47 C.F.R. § 1.4(e)(1)." This raises an interesting point regarding the rule interpretation USAC has applied. Let's assume that March 30 falls on a Wednesday and that a carrier completes FCC Form 507 delivery that day to USAC, but that such delivery is precluded by an early Spring snow storm which causes the Federal government to close on March 30. USAC's rule interpretation would require the document to have been filed with USAC on or before March 29 and would require that carriers predict government closings in advance. Carriers are required to file on the deadlines specified in the FCC's rules, they are not required to predict government closings nor do the rules lock the door when there is a "holiday" closing as USAC's position holds.

FCC Form 507 with USAC on March 31, 2003 and it is respectfully submitted that USAC should determine that TCLP's FCC Form 507 was timely filed, process TCLP's FCC Form 507, and distribute ICLS funds to TCLP as required by the FCC's rules.

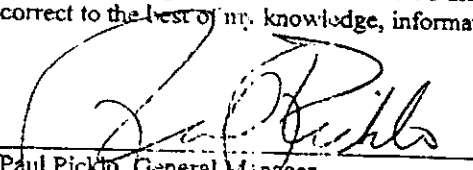
Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070 (office)
(202) 775-9026 (fax)
welchlaw@earthlink.net
December 23, 2003

Respectfully submitted,
THUMB CELLULAR LIMITED PARTNERSHIP


Timothy E. Welch
Its Attorney

CERTIFICATION

I hereby certify under penalty of perjury that I have reviewed the foregoing *Petition for Review of the Denial of USF Funding* and that the facts stated therein, except those about which official notice may be taken, are true and correct to the best of my knowledge, information, and belief.

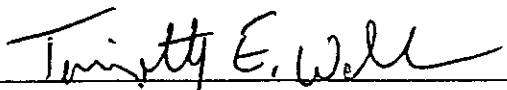


Paul Picklo, General Manager
Thomson Cellular Limited Partnership

December 17, 2003

CERTIFICATION

I hereby certify under penalty of perjury that I have reviewed the foregoing *Petition for Review of the Denial of USF Funding* and that the facts stated therein, except those about which official notice may be taken, are true and correct to the best of my knowledge, information, and belief.



Timothy E. Welch, Esq., Counsel to
Thumb Cellular Limited Partnership

December 22, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of December 2003 filed the foregoing REQUEST FOR REVIEW OF THE DENIAL OF USF FUNDING by First Class United States Mail, postage prepaid, with USAC as follows:

USAC
High Cost Low Income Committee
444 Hoes Lane
RRC 4A1060
Piscataway, NJ 08854

High Cost Low Income Committee
High Cost Low Income Division
USAC
2000 L Street, N.W. #200
Washington, D.C. 20036

Irene Flannery
Vice President-High Cost Low Income Division
USAC
2120 L Street, N.W. #600
Washington, D.C. 20037


Timothy E. Welch

Attachment 3-Commission's May 3, 2004 *Public Notice*



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 4
Internet: <http://www>
TTY: 1-888-8

DA 04-1255

May 3, 2004

WIRELINE COMPETITION BUREAU REMINDS LICENSEES OF ANNUAL EMPLOYMENT REPORT DUE DATE

The Wireline Competition Bureau reminds common carrier licensees employing 16 or more full-time personnel that, pursuant to Section 1.815 of the Commission's Rules, they must file the Common Carrier Annual Employment Report, FCC Form 395, on or before May 31, 2004.¹ Also due at this time is the annual report of discrimination complaints, which must be filed by all licensees, regardless of the number of employees, in accordance with Sections 21.307(d), 22.321(c), and 23.55(d) of the Rules. This requirement may be fulfilled by completing Section V of Form 395, instead of by submission of a separate report.

FCC Form 395, including instructions, may be downloaded from the Commission's Internet site at www.fcc.gov/formpage.html. Copies also may be obtained by calling the FCC's Forms Distribution Center at 1-800-418-3676, or by visiting the self-service forms distribution room at FCC headquarters, adjacent to the 12th Street lobby.

The completed report should be sent to the Commission's Wireline Competition Bureau, Industry Analysis and Technology Division, Washington, DC 20554. The report also may be filed via facsimile transmission to (202) 418-0520. Reports sent via courier should be addressed for delivery to the FCC's mail facility at 9300 E. Hampton Drive, Capitol Heights, MD 20743 (open 8:00 a.m. to 5:30 p.m.).

For further information, contact Mike Lehner of the Industry Analysis and Technology Division at (202) 418-0949, or via TTY at (202) 418-0484.

-FCC-

¹ Because May 31 falls on a Federal holiday this year, the report is due Tuesday, June 1, 2004.


CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of June 2004 served the foregoing *APPEAL OF USAC'S DENIAL OF USF FUNDING* by First Class United States Mail, postage prepaid, upon the following:

USAC
High Cost Low Income Committee
444 Hoes Lane
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Piscataway, NJ 08854

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High Cost Low Income Division
USAC
2000 L Street, N.W. #200
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Irene Flannery
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2120 L Street, N.W. #600
Washington, D.C. 20037


Timothy E. Welch